In The

Supreme Court of the United States

October Term, 1992

Barbara Landgraf,

Petitioner,

v.

USI Film Products, Bonar Packaging, Inc. and Quantum Chemical Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Maurice Rivers and Robert C. Davison,

Petitioners,

v.

Roadway Express, Inc.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR MIDWEST MOTOR EXPRESS, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
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v.

USI FILM PRODUCTS, BONAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. 92-938

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR MIDWEST MOTOR EXPRESS, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, ND, operating in nine states. Midwest's interest stems from likely legislation pending in Congress that would create another retroactive application problem identical to the one under the Civil Rights Act of 1991 now before this Court. Enactment of such legislation without a clear-cut *prospective* effective date would expose Midwest to serious threat of injury. Therefore, *amicus* seeks resolution by this Court of the apparently conflicting precedents on retroactive application of federal civil legislation.

Since August 12, 1991, Midwest has been engaged in a labor dispute with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters"), within the meaning of the Norris-LaGuardia Act (29 U.S.C. § 111(c)), and the National Labor Relations Act ("NLRA") (29 U.S.C. § 152(9)), as applied to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") (29 U.S.C. § 1398).[1] Nevertheless, not unlike the instant appeals under the Civil Rights Act of 1991, a proposed amendment to the NLRA threatens to turn Midwest's past legal actions into illegal ones—by retroactive application of a new law.

Legislation has been introduced in Congress to amend the NLRA (H.R. 5 and S. 55) which contains no effective date concerning when an employer may be prohibited from hiring permanent replacement workers during economic (wage and benefit) strikes. The relevant identical language of H.R. 5 and S. 55 is excerpted and attached as Appendix A. Consequently, if that legislation passes as currently drafted,[2] and if this Court now fails to resolve the apparent conflict between *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), Midwest expects that controversy and confusion similar to that engendered by the retroactive application of the Civil Rights Act of 1991 will occur. Such confusion is likely to result in serious adverse harm to Midwest's business and could subject it to unfair labor practice charges and/or costly state litigation. *See infra* at 13-17. The mere prospect of these occurrences is jeopardizing Midwest's ability to remain in business.

Accordingly, *amicus* has a vital interest in the resolution of the issues raised in this case. *Amicus* believes it will bring insights and information beyond what is presented by Petitioners and Respondents, which will be useful to the Court in deciding the issues presented.[3]

STATEMENT

These cases involve contradictory principles governing the prospective application of civil laws, which conflict this Court so far has been reluctant to resolve. Although the principle of prospectivity dates to the Greeks and Romans,[4] it has not always been followed by this Court.

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[1] The Teamsters struck Midwest on August 12, 1991, after negotiations over a new contract reached an impasse. Following commencement of the strike, the parties resumed bargaining with the assistance of a federal mediator, which bargaining has continued to the date of this brief without settlement. During the course of this labor dispute, Midwest has continued to operate only by hiring permanent replacements as it is permitted to do under current federal law.

[2] H.R. 5 and S. 55 were introduced in the Senate and the House of Representatives in January 1993. H.R. 5, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. H82, (daily ed. Jan. 5, 1993); S. 55, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. S191, (daily ed. Jan. 21, 1993). House and Senate floor action is eminent, and the Clinton Administration has endorsed the legislation as drafted. *Fairness in the Workplace: Restoring the Right to Strike: Hearing on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 103rd Cong., 1st Sess. (March 30, 1993) (statement of Robert B. Reich, Secretary of Labor).

[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of Court.

[4] As begins the seminal work on the rule against retroactivity: "The bias against retroactive laws is an ancient one." Smead,

At the heart of the dispute is this Court's holding that a court is to apply the law in effect at the time it makes its decision, unless doing so would result in "manifest injustice" or there is statutory direction (or legislative history) to the contrary. *Bradley*, 416 U.S. at 711. On the other hand, this Court more recently reaffirmed that "[R]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have effect unless their language requires this result." *Bowen*, 488 U.S. at 208.

There is a compelling reason for this Court to clarify its position and to adopt a bright-line, common-sense ruling based on *Bowen*. As Justice Scalia urged in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring), this Court should overrule *Bradley* and reaffirm the clear intent rule, since retroactive application is "never sought (or defended against) except as a means of 'affecting substantial rights and liabilities,'" and even procedural changes applied retroactively alter such rights. *Id.* at 1585. Thus, this Court should heed Justice Scalia's warning that "manifest injustice" is "just a surrogate for policy preferences" and that justice can mean "whatever other policy motivation might make one favor a particular result." *Id.* at 1587.

Failure to resolve this conflict will lead to continued examples of congressional recklessness, as demonstrated by the instant cases under the Civil Rights Act of 1991.[5] Midwest contends that the same result will occur in

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The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 776-85 (1936).

[5] Only controversy, confusion, and expensive and protracted litigation has resulted when Congress deliberately leaves the effective date issue unresolved, as it did in the Civil Rights Act of 1991. As of mid-1992, 49 federal courts had ruled against retroactivity and 35 had ruled in favor of it. *See* Marcus, *A Percolating Legal Dispute on Civil Rights*, The Washington Post, April 17, 1992, at A21.

federal striker replacement and other legislation, unless the cardinal rule upheld in *Bowen* is reaffirmed.

SUMMARY OF ARGUMENT

Respondents ask this Court to affirm the decisions by the Fifth and Sixth Circuits that the Civil Rights Act of 1991 does not apply retroactively. In support, Midwest submits that the judicial chaos surrounding the retroactive application of legislation is the result of a dramatic departure from the historical rule against retroactivity.

Whether *Bradley* and *Bowen* can co-exist on a highly theoretical basis is, at best, debatable. *See infra* note 10 and accompanying text. In practice, however, clarifying the existing confusion necessarily depends on rejecting the irreconcilable precept which *Bradley* has been held to support that it is *not* unjust, in most cases, to apply new civil legislation retroactively.

The Supreme Court must find *Bradley* is applied wrongly as a "presumption" in favor of retroactivity whenever a new liability altering the position of private litigants and parties is involved, whether substantive or procedural rights are implicated. *See* Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 George Mason Univ. L. Rev. 231, 239-40 (Winter 1990). To this extent, the Supreme Court should overrule *Bradley* and reaffirm the long-standing rule of statutory construction that federal civil legislation only applies prospectively, unless there is a clear legislative intent to the contrary. Ambiguity—either intentional or unintentional—must be resolved in favor of the prospective application of legislation.

Moreover, Petitioners' interpretation of *Bradley* represents a blatant departure from the fundamental principles of fairness inherent in the clear intent rule upheld in *Bowen*. Accordingly, Petitioners' analysis stands wholly outside of the implicit constitutional and relevant policy factors which this Court must weigh in deciding these

cases. Under Petitioners' view, judicial review, Congress' role, and fairness each is undermined.

First, Petitioners erroneously assume that Respondents have acted wrongly in order to argue that Respondents have no "vested right to do wrong." *Rivers v. Roadway,* Pet. Brf. at 29; *Landgraf v. USI Film Products,* Pet. Brf. at 31. Second, Petitioners unpersuasively argue that the plain meaning of the Civil Rights Act of 1991 demonstrates a clear congressional intent to apply the law retroactively. Third, Petitioners move beyond the pale and assert that, under *Bradley,* any law (whether procedural or substantive) must be presumed retroactive based upon whatever label, political spin or policy preference the prevailing members of Congress place on the law, regardless of its effect on private parties or "what the original statute actually meant." *Rivers v. Roadway,* Pet. Brf. at 38. In Petitioners' view, if Congress labels a statute remedial or restorative, there is no room for judicial scrutiny.[6] *Landgraf v. USI Film Products,* Pet. Brf. at 29-33; *Rivers v. Roadway,* Pet. Brf. at 35-39. This Court must reject each of these specious arguments.

Rather than merely a judicial premption useful in interpreting ambiguous legislation, *Bowen* moreover, represents the cardinal rule of statutory construction in determining the retroactive application of legislation. By clarifying *Bowen* as such, this Court will preserve the appropriate burdens and roles of the legislature and the judiciary, including the historical and proper role of judicial review as a check on the power of the legislature unfairly to render laws retroactive.

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[6] Ironically, the one type of law historically not forbidden by the American principle of prospectivity was the "curative" law *validating* past acts that otherwise would have been void. But even curative laws that impaired vested rights or otherwise worked an injustice to parties were condemned by the American principle. *See* Smead at 786, n.36.

ARGUMENT

I. THE PRINCIPLE UPHELD IN BOWEN REPRESENTS THE CARDINAL RULE OF STATUTORY CONSTRUCTION GOVERNING THE RETROACTIVE APPLICATION OF FEDERAL CIVIL LEGISLATION

As Justice Scalia's concurring opinion in *Bonjorno* reveals, the principle that laws and customs should apply only to future transactions unless expressly stated that they apply either to past conduct or to pending transactions dates to the Greeks and Roman law. *Bonjorno,* 110 S. Ct. at *1586; Fray v. Omaha World Herald Co.,* 960 F.2d 1370, 1374 (8th Cir. 1992). The principle, originally one of "natural law" which became a legal maxim under English law, was applied as a rule of statutory construction, and so found its way into American law.[7] In the United States, however, largely as a result of judicial review, this rule of statutory construction was combined with the concept of "vested rights" and "justice" to become a part of the concept of justice and a limitation on legislative power.[8] *See* Smead at 776-85.

Thus, the American principle of prospectivity has operated to protect vested rights by invalidating or narrowing the application of statutes that might have applied retrospectively. These included statutes that expressly

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[7] As in England, retroactive American laws were held to be oppressive and unjust, and it was maintained that the essence of law was that it be a rule for the future. Smead at 780, n. 21.

[8] In addition to being a rule of statutory construction in American law, the American courts added a judicial limitation on the constitutional ability of a legislative body to alter pre-enactment rights and conduct. Judicial scrutiny is an important component of the American constitutional system which controls legislative behavior. *See, e.g., Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 14-20 (1976). *See also* DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered,* 10 Ohio Northern L. Rev. 253 (1983).

were enacted to take effect from a time prior to their passage, as well as statutes that were to operate from the time of their passage, but affected vested rights and past transactions.[9] *See* Smead at 781-787, n.35. The fundamental notion has been and should be that, in most cases, it is unjust to apply new civil legislation retrospectively.

The rule against retroactivity thus embodies American constitutional notions of fairness and due process. Today, these factors must be considered by Congress and the courts in determining the validity of civil legislation which Congress *explicitly* makes retroactive. *See, e.g., Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984) (rejecting a Fifth Amendment due process challenge to a federal statute that retroactively imposed liability on employers who withdrew from multiemployer pension plans); *Turner Elkhorn*, 428 U.S. 1.[10] There-

[9] The prohibition included retrospective laws as defined by Mr. Justice Story in *Society for the Propagation of the Gospel in Foreign Parts v. Wheeler*, (1814) 2 Gall. C.C. 105:

> . . . . Upon principle, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective. . . .

[10] The Supreme Court has found the rational basis standard to be equivalent to the standard applied in *Welch v. Henry*, 305 U.S. 134, 147 (1938), where the Court held that a retroactive tax was constitutional unless its application was so "harsh and oppressive" as to violate due process. *R.A. Gray*, 467 U.S. at 733. This standard requires that there be a rational connection between the legislation's purpose and its retroactive effect. It is consistent with the rule against the retroactive application of legislation where Congressional intent is not explicit or clear. In the latter case, a statute need not be invalidated, but simply applied prospectively.

Arguably, the *Bradley* presumption in favor of retroactivity absent "manifest injustice" arose from cases in which retroactivity was explicit or clearly intended but "injustice" resulted. *See Bonjorno*, 110 S. Ct. at 1584. Theoretically, in this very limited context, *Bradley* remains viable. *See also Fray*, 960 F.2d at 1374 (*Bradley* did not "silently sweep away the traditional principle").

fore, when Congress makes a statute expressly retroactive, presumably it has reviewed these considerations and has resolved the inherent tensions involving fundamental fairness.

Accordingly, it is incongruous to suggest that legislation *not* explicitly made retroactive should be presumed to be retroactive, and then reviewed perfunctorily based upon a standard (such as Petitioners' conclusory remedial scheme), that ignores the fundamental issue of fairness which is the cornerstone of the historical rule of statutory construction against retroactivity. *See* DeMars at 264-272 (because the vested rights—remedial scheme approach utilizes analytically conclusive terms, it does not lead a court to consider the question of fairness which is also basic to the issue of statutory retrospectivity).

In particular, as with the Civil Rights Act of 1991, where Congress considered and rejected explicit retroactive application *and* failed to reach a consensus on its intent, after reviewing the requisite constitutional considerations, no finding of retroactivity is justified or should be compelled. *See infra* at 10-12.

Therefore, Midwest submits that the rule reiterated in *Bowen* is not only that prospectively must be upheld in the absence of clear intent, but further, that prospectivity must govern in determining clear intent when retroactivity is not explicit. Thus, to the extent that *Bradley* establishes a presumption in favor of retroactivity in the absence of clear intent or in determining clear intent, *Bradley* is wrong and should be overruled.

Accordingly, Midwest urges this Court to find that the cardinal rule of statutory construction in determining the retroactive application of federal civil legislation is the principle (and not merely the "presumption") that legislation must be applied prospectively, unless Congress specifically provides to the contrary. *See* Smead at 781 n.22; *U.S. v. Magnolia Petroleum Co.*, 276 U.S. 160, 162 (1928) ("statutes are not to be given retroactive

effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears"). *But see Luddington v. Indiana Bell Telephone*, 966 F.2d 225, 228 (7th Cir. 1992), *petition for cert. pending*, No. 92-977 (*dictum*) (prospectivity "is resolved, but not all the way" because we are "speaking only of a presumption" against retroactivity). Only in concert with this paramount rule, can ancillary rules of construction utilized by the courts to determine statutory meaning and legislative intent (i.e., plain meaning) effectively operate without injury to the historical notions of fairness and justice upon which the principle is based.

II. BOWEN PRECLUDES THE RETROACTIVE APPLICATION OF NEW FEDERAL CIVIL LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHERE NO CONGRESSIONAL INTENT IS CLEAR

The express retroactive provisions of the Civil Rights Act of 1990 stirred much debate and disagreement as Congress grappled with concerns of fairness and constitutionality.[11] President Bush vetoed the 1990 act,[12] and Congress failed to override the veto. 136 Cong. Rec. S16,589 (daily ed. Oct. 22, 1990). In 1991, the bill's sponsors dropped the express retroactive provisions in order to gain acceptance and, instead, inserted language providing that "the amendments made by this Act shall

[11] *See, e.g.*, H.R. 4000, The Civil Rights Act of 1990; *Joint Hearing: Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); Civil Rights Act of 1990: *Hearing Before the Senate Comm. on Labor and Human Resources on S. 2104*, 101st Cong., 1st Sess. (1989).

[12] President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632-34 (Oct. 22, 1990), *reprinted in* 136 Cong. Rec. S16,457, S16,458 (daily ed. Oct. 24, 1990).

take effect upon enactment."[13] § 402 (a), 105 Stat. 1099. Arguably, this language explicitly states that the Act applies prospectively. Alternatively, the inference of Congress' action is that prospectivity is intended. *See e.g., National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967).

Because of its contradictory legislative history, however, the 1991 provision leaves open whether the law applies retroactively to cases pending on the date of enactment or whether the law applies only prospectively to future cases.[14] Clearly, the Act was passed without agreement on the issue, and apparently various members of Congress hoped this Court would resolve the known conflicting legal authorities in *Bradley* and *Bowen* in their favor. Congress thereby intentionally left its meaning unresolved. Thus, Petitioners' argument that the plain meaning of the Civil Rights Act of 1991 compels retroactivity fails. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372-1373 (5th Cir. 1992).

In *Bonjorno*, the Supreme Court simply reaffirmed that "where the congressional intent is clear, it governs." *Bonjorno*, 110 S. Ct. at 1577. But enactment of an ambiguous statute such as the Civil Rights Act of 1991,

[13] On November 21, 1991, President Bush signed the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). In addition to reversing several Supreme Court decisions, the Act made substantial substantive and procedural changes including changes in adjudicator (jury) and damages (compensatory and punitive damages).

[14] *See* 137 Cong. Rec. S15,483, S15,485 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Danforth, the bill's Republican sponsor, arguing against retroactivity); 137 Cong. Rec. S15,472, S15,478 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Dole arguing against retroactivity); 137 Cong. Rec. S15,485 (daily ed. October 30, 1991) (interpretive memorandum by Sen. Kennedy, the bill's Democratic sponsor, arguing for retroactivity by characterizing the law as a "restoration of a prior rule"). *Notably, no sponsor characterized the legislation as merely procedural or remedial.*

or a *silent* statute such as the proposed federal striker replacement legislation, can defy any meaningful attempt to discern congressional intent. Under these circumstances, the historical constitutional underpinnings of American law require that *Bowen* prevail as the cardinal rule of statutory construction, not merely as "presumption" to be utilized in deciding among competing policy considerations. In effect, reaffirming the *Bowen* clear intent rule would ensure that, in the future, Congress will deliberate and provide clear intent on the retroactive application of any legislation that contains potential constitutional and fairness concerns.[15] Therefore, because nothing in the Civil Rights Act of 1991, or its legislative history, expresses a clear congressional mandate requiring retroactive application, the statute must not apply to pending cases.[16]

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[15] While the clear intent rule does not require that Congress make explicit its intent to apply a statute retroactively, it does require that Congress make its intent clear. *Bonjorno*, 110 S. Ct. at 1577. Hence, the cardinal rule against retroactivity may be superseded only by express statutory language or by implication when the statute "requires" it, i.e., when limiting the statute to prospective application would render it completely ineffective by defeating its entire purpose. *See e.g., United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (in order to be effective, CERCLA had to reach past conduct).

[16] Not surprisingly, the large majority of circuit courts have applied the *Bowen* "presumption" against retroactivity finding no clear expression of legislative intent to the contrary. *See Lehman v. Burnley*, 866 F.2d 33, 37 (2nd Cir. 1989); *Davis v. Omitowoju*, 833 F.2d 1155, 1170-1171 (3rd Cir. 1989); *Leland v. Federal Ins. Adm'n.*, 934 F.2d 524, 528-529 (4th Cir.), *cert. denied*, 112 S. Ct. 417 (1991); *Storey v. Shearson-American Exp.*, 928 F.2d 159, 161-162 (5th Cir. 1991); *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-598 (6th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *DeVargas v. Mason and Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377, 1392 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 799 (1991); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 900 (D.C. Cir. 1992); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992); *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 918, 922-923 (Fed. Cir. 1990).

III. THE RETROACTIVE APPLICATION OF LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHICH CREATES NEW LIABILITIES AND DUTIES BEYOND RESTORATIVE LAW, RESULTS IN STAGGERING REAL WORLD CONSEQUENCES

The Civil Rights Act of 1991 significantly expands both 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964 to include new causes of action as well as new classes of plaintiffs. The enhanced remedies for intentional discrimination under Title VII in effect create new liabilities for sexual harassment in situations that do not involve tangible job detriments, such as "hostile environment" cases in which the plaintiff suffered no specific adverse employment action that resulted in economic harm. Monetary damages were never available before in such cases under Section 1981 or Title VII. Rights under Section 1981 are extended to post-formation contractual relationships. In effect, conduct insufficient to impose *liability* on employers before the Act was passed, may now be enough to result in a finding of discrimination against those same employers. Coil and Weinstein, *Past Sins or Future Transgressions: The Debate Over Retroactive Application of the 1991 Civil Rights Act*, 18 Employee Relations Law Journal 5, 6 (1992); *see e.g., Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374-1375 (1922); *Luddington*, 966 F.2d at 229.

Nevertheless, Petitioners argue that the Civil Rights Act of 1991 affects only procedure or remedies, and thus should be applied retroactively.[17] In addition to precluding a meaningful analysis of fairness, a key problem with this approach is that the label applied to a particular

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[17] If Congress had, in fact, intended *only* to restore prior law or to provide remedial rights that did *not* create new liabilities, Midwest submits it could have written language to achieve that limited result. *See Johnson*, 965 F.2d 1363.

change may not reflect whether the change alters substantive rights or conduct. The label becomes a "policy" tool for proponents of retroactive legislation. *See Bonjorno,* 110 S. Ct. at 1585.

Petitioners also argue that, because one purpose of the Civil Rights Act of 1991 was Congress' intent to overturn recent Supreme Court decisions on discreet employment law issues, retroactivity must be presumed. *See Rivers v. Roadway,* Pet. Brf. at 35-39. While a few courts, grappling with the conflict between *Bradley* and *Bowen,* have held that retroactive application of a new law is appropriate where Congress clearly intended to overrule recent case law and restore the law to its former state, other courts reject this approach as too speculative. *See Mojica v. Gannett Co.,* 779 F. Supp. 94, 97 (N.D. Ill. 1991) (retroactive application of the Civil Rights Act of 1991 upheld in part on the basis that the Act was meant to "restore" prior law); *but see DeVargas,* 911 F.2d at 1387. By reaffrming *Bowen* as the cardinal rule of statutory construction against retroactivity, this Court would eliminate the expansive dangers inherent in Petitioners' approach. Only prospective application of a new law would be appropriate, absent a clear congressional intent to apply a statute retroactively in order to restore recent prior law.

The potential unfair application of likely federal striker replactment legislation to Midwest's ongoing labor dispute starkly demonstrates the absurdity of Petitioners' position. Under Petitioners' interpretation of *Bradley,* the mere conclusory characterization (albeit erroneous) of federal striker replacement legislation as "restorative" would result in the retroactive application of legislation to Midwest.[18]

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[18] Proponents of H.R. 5 and S. 55 are characterizing the legislation as "restorative law" designed to overturn the Supreme Court's decisions in *NLRB v. Mackay Radio and Telegraph Co.,*

This result could require the National Labor Relations Board ("NLRB") to find that Midwest retroactively committed an unfair labor practice by hiring some permanent replacements after August 12, 1991 under the newly amended law.[19] See Attachment A for proposed language of H.R. 5 and S. 55 adding 29 U.S.C. § 158(a)(6). Moreover, such a result could turn the current labor dispute on its head by converting the Teamsters strike against Midwest from an economic strike into an unfair

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304 U.S. 333 (1938), and *Trans World Airlines v. Independent Federation of Flight Attendants,* 109 S. Ct. 1225 (1989). *See* note 2 *supra,* at 3. The legislative history of the NLRA conclusively refutes this position and demonstrates that the changes sought by H.R. 5 and S. 55 would alter the long-standing legal right of an employer to permanently replace economic strikers affirmed under the NLRA. The legislative history of the Wagner Act of 1935 (the original NLRA) preserved the right of an employer to hire replacements, whether permanent or temporary. Although the Wagner Act did not address the issue directly, a U.S. Senate Education and Labor Committee memorandum regarding the Wagner bill states:

> [The bill] provides that the labor dispute shall be "current," and the employer is free to hasten its end by hiring a new permanent crew of workers and running the plant on a normal basis . . . . The broader definition of "employee" in [the bill] does not lead to the conclusion that no strike may be lost or that an employer may not hire new workers, temporary or permanent, at will.

See Senate Comm. on Education and Labor, *Comparison of S. 2926 and S. 1958,* 74th Cong., 1st Sess. 21-22 (1935), *reprinted in A Legislative History of the National Labor Relations Act,* 1935, pp. 1319, 1346 (1985 Reprint, U.S. Government Printing Office).

[19] Ironically, while the Board may not issue a complaint based upon conduct occurring more than six months before filing and service of the charge (29 U.S.C. § 160(b)), the six month limitations period does not begin to run until the party adversely affected receives actual or constructive notice of the unfair labor practice. *See Lehigh Metal Fabricators,* 267 NLRB 568, 114 LRRM 1064 (1983); *Plymouth Locomative Works,* 261 NLRB 595, 110 LRRM 1155 (1982); *Crown Cork & Seal Co.,* 255 NLRB 14, 107 LRRM 1195 (1981).

labor practice strike. *See NLRB v. Burkart Foam,* 848 F.2d 825 (7th Cir. 1988); *NLRB v. Jarm Enters,* 785 F.2d 195 (7th Cir. 1986); *NLRB v. Charles D. Bonanno Linen Serv.,* 782 F.2d 7 (1st Cir. 1986); *Vulcan-Hart Corp. v. NLRB,* 718 F.2d 269 (8th Cir. 1983). The most significant aspect of an unfair labor practice strike is that strikers are entitled to reinstatement to their former positions upon an unconditional offer to return to work. *Pecheur Lozenge Co.,* 98 NLRB 496, 29 LRRM 1367 (1952), *enforced as modified,* 209 F.2d 393, 33 LRRM 2324 (2nd Cir. 1953). In effect, the economic strikers would be entitled to reinstatement if the NLRB were to find that Midwest commited an unfair labor practice which had the effect of prolonging the economic strike (i.e., that hiring permanent replacements presumptively prolonged Midwest's strike). *See Vulcan-Hart Corp.,* 718 F.2d 269; *Gilberton Coal Co.,* 291 NLRB 344, 131 LRRM 1329 (1988), *enforced,* 888 F.2d 1381 (3rd Cir. 1989). These strikers would have to be reinstated even though Midwest hired permanent replacements. *See Mackay,* 304 U.S. 333.

Moreover, Midwest would be required to terminate its current permanent replacements, even though they were *legally* hired. *See NLRB v. Elco Manufacturing Co.,* 227 F.2d 675 (1st Cir. 1955), *cert. denied,* 350 U.S. 1007 (1956); *NLRB v. Remington Rand, Inc.,* 130 F.2d 919 (2nd Cir. 1942). Midwest's picture could become even more oppressive because the terminated permanent replacement workers could sue Midwest for breach of contract and misrepresentation in North Dakota state court upon their discharge to make room for reinstatement of the economic strikers. *See Belknap, Inc. v. Hale,* 463 U.S. 491 (1983).[20] The weight of such multiple

[20] The Supreme Court of North Dakota has upheld similar breach of contract suits. *See Lambott v. United Tribes Educational Technical Center,* 361 N.W.2d 590 (1985).

litigation alone could force Midwest out of business. Indeed, the real world consequences to Midwest of applying federal striker replacement legislation retroactively under *Bradley* based upon mere labels could be staggering.

Therefore, it is in determining a clear congressional intent that judicial review and the principle of fairness embodied in the rule of statutory construction against retroactivity become imperative. Petitioners segregate this critical analysis entirely from the determination of the "plain meaning" and "clear intent" of the statute by misinterpreting *Bradley* to require the retroactive application of any new federal civil legislation which is labeled "procedural" or "restorative". As Midwest has shown, this argument is untenable.

CONCLUSION

Because of the conflicting principle in *Bradley* that retroactivity is *not* unjust and is presumed, the door is open for Congress to pass federal civil legislation (such as the Civil Rights Act of 1991 and the proposed federal striker replacement legislation), without resolving its applicability to current disputes. While such a state of confusion may enable Congress to pass controversial legislation, it improperly allows Congress to shift the burden of deciding the issue of retroactivity onto private litigants and the courts at an exorbitant cost.

Therefore, this Court should guide the lower courts and restore judicial order and economy, should encourage Congress to provide clear intent, and should preserve the important, long-standing origins and purpose of the cardinal rule of statutory construction against retroactivity. The Court would accomplish all of these objectives by reaffirming *Bowen* and overruling *Bradley.* Absent explicit retroactive language or clear congressional intent, legislation must apply only prospectively. This is the bright-line, common-sense rule needed to restore fundamental fairness to the concept of retroactivity.

district which had 26.7 percent African-American voting age population.[8] Senate District 40 is 34.5 percent African-American VAP and included much of Representative Jones' House District.[9]

Testimony at trial forecast that District 40 would elect an African-American Senator.[10] Based on the evidence, the district court found as a fact that Senate District 40 "performs as a third African-American district without adversely affecting Hispanics in the Dade County area." J.S. App. 66a.

In the November 1992 elections, Senate District 40, which the district court termed "a strong African-American influence district," J.S. App. 64a, did, in fact, elect an African-American Senator, Daryl Jones.[11]

SUMMARY OF ARGUMENT

In this consolidated appeal of three separate lawsuits, not a single party challenges the district court's findings of a Section 2 violation in the Senate districts in Dade County with respect to African-American plaintiffs. These issues are not before the Court and, in any event, the findings were not clearly erroneous.

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[8] *Id.*

[9] *Id.*

[10] Testimony of Leon Russell, first vice president of the Florida State Conference of NAACP Branches. Vol. III Tr. 136 (Daryl Jones, an African-American, will win Senate District 40); testimony of Representative Willie Logan, Chairman of the Florida Caucus of Black State Legislators, Vol. III Tr. 147.

[11] Although the November 1992 election results occurred post-trial and therefore are not in the trial record, this Court can take judicial notice of the certified copy of relevant pages from *Elections 1992; State of Florida Official General Election Returns: Nov. 3, 1992*, Fla. Dept. of State, Div. of Elections (hereinafter "1992 Official General Election Returns") which is attached as an Appendix to this brief. *Brown* v. *Piper*, 91 U.S. 37, 42 (1875) (judicial notice taken of the election of senators).

Failure to conduct a remedy hearing was error. The limited evidence of remedy at the liability trial was not sufficient to permit the court below to throw up its hands and declare that no remedy was possible. If, after a full remedial hearing, it appears that complete relief can be only accorded to one minority group, it should be that minority group which the court below finds to be the most historically disadvantaged in the affected political unit, here African-Americans in the Dade County area.

The proceedings in the Florida Supreme Court were expressly "without prejudice" to later assertion of Voting Rights Act claims that the state court's limited review neither resolved nor provided opportunity to resolve. Questions about "influence" districts, citizen voting age population (CVAP) and sustained electoral success necessary to prove a defense of proportional representation under *Thornburg v. Gingles*, 478 U.S. 30 (1986), are not necessary to the decision by the Court and, if reached, do not in any event affect the liability determination in favor of African-American plaintiffs arising out of the Senate districts in Dade County.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND LIABILITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT IN FAVOR OF AFRICAN-AMERICAN PLAINTIFFS.

Although there was initial confusion in the district court about its liability holding, this confusion was dispelled by the court's opinion. J.S. App. 72a. As clarified, the district court found violations of Section 2 of the Voting Rights Act with respect to the Senate districts in Dade County, but on the record before it declined to order a remedy.

As to the determination of liability to African-American plaintiffs under Section 2 of the Voting Rights Act, the court below was clearly correct and amply supported by

the record.[12] None of the consolidated appeals before this Court challenges those findings of fact or that conclusion of law.

To the extent that several *amici*[13] contend that proof of the three threshold *Gingles* factors does not conclusively establish a Section 2 violation, this argument misstates the district court's holding "that the plaintiffs have satisfied each of the three elements *Gingles* requires *and* that when considered together with the Senate factors, the 'totality of circumstances' show that with respect to Florida's Senate plan, Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act." J.S. App. 30a (emphasis supplied). Even more to the point, *amici* may not raise questions not presented by the parties. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.1 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 532 n.13 (1979). Since none of the parties has challenged the findings of Section 2 violations with respect to vote dilution of African-Americans in Senate districts, the *amici* may not do so.[14]

There was initial confusion below about the proper interplay of liability and remedy in the context of multiple—and perhaps competing—Section 2 claims in a consolidated lawsuit. Ultimately, the district court got it right—a plaintiff does not carry the burden in its liability case to prove the efficacy of any particular remedy. Nothing in the language of the Voting Rights Act of 1965 as amended,[15] the Senate report explaining the 1982 amend-

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[12] *See* the United States' brief, at 6-7.

[13] Brief *amicus curiae* of Anti-Defamation League of B'Nai B'rith at 10 *et seq.*; Brief *amici curiae* of the American Jewish Congress *et al.* at 41.

[14] Although the brief of the American Jewish Congress does not list a "Question Presented," it is apparent from topic heading III B and its entire argument that it is directly attacking this Court's plurality opinion in *Thornburg* v. *Gingles*, *supra*.

[15] 42 U.S.C. §§ 1973 *et seq.*

ments,[16] or this Court's decision in *Thornburg* v. *Gingles*, *supra*, imposes that additional burden on plaintiffs—or even contemplates it.

Such a result would be bad law and worse policy. If plaintiffs were required to prove remedy as an additional element of the liability case, it would contravene in large part this Court's prior holdings that the State must be given the first opportunity to submit a plan that remedies a Section 2 violation.[17] Sound considerations of the proper boundaries between legislative and judicial branches vest in the legislature the duty to choose among competing political values in drawing boundaries not otherwise required to redress legal violations. Moreover, as a practical matter, it is usually the State in the first instance that has access to superior data and computer technology to draw political boundaries to redress legal violations.

Accordingly, the liability determination should be affirmed.

II. REMEDIAL PROCEEDINGS WERE NECESSARY.

The district court did not hold a remedial hearing on the Senate districts.[18] Instead, it relied upon some of the evidence that had been introduced at the liability stage in order to support its conclusion in regard to remedy. The error here is manifest. If courts could dispense at will with remedial proceedings, particularly without advance notice to the parties, the liability phases of these already-complicated redistricting proceedings would be turned into a jumble of confusing evidence, as parties tried to make certain that they anticipated and dealt with every possible remedy in the event the court decided to forego the second stage.

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[16] S.Rep. No. 417, 97th Cong., 2d Sess. (1982).

[17] *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.).

[18] It held a short, same-day non-evidentiary proceeding on the House remedy.

There are valid reasons for a two-stage approach to redistricting. First, neither the courts nor the parties should have to spend valuable resources dealing with remedies unless it is clear—and the courts have already held—that there is liability. This necessarily means a two-stage process.

Second, although new evidence will undoubtedly be introduced, the parties at the remedial proceeding should also be able to build upon, explain or rebut the evidence relating to remedy tangentially introduced at the liability stage. This is not possible if the liability stage is on-going at the time the remedial evidence is submitted.

Third, holding a separate remedial hearing will give the parties time to develop and present various workable plans that the courts can then consider in light of the entire record. The problems inherent in the alternative approach are apparent from the instant record: during the liability stage, after a very short time to think about the matter, the NAACP representative was not able to construct a plan that he thought would accommodate both the Hispanic and African-American interests. This dilemma may have been subsequently solved, however, after more reflection and computer work-time could be devoted to the task. All of this confusion could easily have been avoided if the district court had made clear from the outset that remedies would not be addressed until after liability had been either proved or disproved.

The district court's remedial conclusion, although defensible if in the expedited context of a motion for preliminary injunction, is particularly suspect here where the court below denied a same-day motion for reconsideration that presented it with the very 4-3 plan that the court had found was not possible. JA 482. In truth, the 4-3 plan in all likelihood would have been proved possible and in any event should have been the subject of remedial proceedings.

In closing argument, counsel for the NAACP suggested the appropriate remedial course for the district court to follow:

> Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. *If it is possible to accomplish that solution,* the NAACP supports that solution. NAACP does not seek to come into this Court and advance a claim on behalf of its members at the expense of another minority group.
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> * * * *
>
> On the other hand, what happens if this Court ultimately concludes that a 4 3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And I submit to Your Honor that the record is clear that that is African-Americans.
>
> From the Congressional trial this Court has before it Census data that is replete with evidence that in South Florida, in areas of jobs and housing and education and health care, blacks are very, very seriously disadvantaged and comparably more disadvantaged than are Hispanic groups. The record also is replete with evidence that the Hispanic population in South Florida is growing much more rapidly than the black population of South Florida, thereby making it ever more difficult for blacks to elect their candidates of choice. [JA 475-76 (emphasis supplied).]

This is still the NAACP position: if a plan can be devised, as here, where both minority groups can be accommodated, that should be done; but in a situation where the two plans really are mutually exclusive, the advantage should be given to the historically most disadvantaged of the two groups, which in this case was the

African-American group. This approach provides a bright-line test that the NAACP respectfully commends to this Court as preferable to the district court's conclusion of violations for which there is no remedy.

The NAACP is *not* seeking in this Court an outcome as appellee that "would result in greater relief than was awarded . . . by the District Court." *Barry* v. *Varchi*, 443 U.S. 55, 69 n.1 (1979). As explained by the court below, J.S. App. 65a, the State plan created, in effect, a third African-American district in Senate District 40 that subsequently elected African-American Daryl Jones in November 1992.

In any event, while this Court certainly can provide guidance to the district court on the subject of mutually-exclusive remedies, we submit that the entire subject of remedies should be decided in the first instance by the district court at a remedial hearing after all parties are given an opportunity to appear and be heard.

III. THIS COURT NEED NOT REACH ANY HYPOTHETICAL QUESTION ABOUT "INFLUENCE" DISTRICTS.

As noted above, in November 1992 the voters of Florida Senate District 40 elected Daryl Jones, an African-American, to the State Senate.[19] Florida Senate District 40 is thus more than an "influence" district. The court below correctly found as a fact that African-Americans could elect a candidate of their choice in that district. It is a district today represented by an African-American Senator.

In light of this electoral development, the NAACP respectfully suggests that this case is not an appropriate vehicle for abstract speculation about "influence" districts. The entire discussion by the United States at pages 16-18

[19] Appendix at 3a.

of its brief, therefore, need not be addressed.[20] Here, as in *Voinovich*,[21] *Growe* [22] and *Gingles*,[23] hypothetical questions about influence districts can be preserved for another day and a proper case where they are directly presented.

IV. THE DISTRICT COURT PROPERLY DEFERRED JURISDICTION UNDER *GROWE* v. *EMISON* UNTIL STATE PROCEEDINGS WERE CONCLUDED.

Anticipating this Court's decision in *Growe* v. *Emison*, *supra*, the district court stayed this action until the conclusion of all state proceedings. The district court was clearly correct.

Any suggestion that the NAACP and others might be barred by *res judicata* or collateral estoppel by virtue of the Florida Supreme Court's proceedings misconstrues the limited review by that court. There was no full and fair opportunity to litigate the NAACP's Voting Rights Act claims in the two proceedings there. *Allen* v. *McCurry*, 449 U.S. 90 (1980). Indeed, as outlined below, the Florida Supreme Court said so expressly.

The proceedings in the Florida Supreme Court were original actions, by the state attorney general, pursuant to article III, section 16(c) of the Florida Constitution. That section mandates a judgment by the Florida Supreme Court within thirty days regarding the validity of

[20] The NAACP also agrees with the United States' earlier brief in opposition to motion to dismiss or affirm, No. 92-767 at pp. 9-10, that "[t]he difficult questions concerning the definition and legal status of influence districts in Section 2 litigation were not fully developed in this litigation . . ." and with its suggestion that "[t]he need to address those questions can be obviated by remanding the case to the district court for appropriate remedial proceedings." *Id.* at 10.

[21] *Voinovich* v. *Quilter*, 113 S.Ct. 1149, 1157-58 (1993).

[22] *Growe* v. *Emison*, 113 S.Ct. 1075, 1084 n.5 (1993).

[23] *Gingles*, 478 U.S. at 46-47 n.12.

a reapportionment plan. In its May 13, 1992 decision, the Florida Supreme Court acknowledged:

> At the same time, it is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in *Thornburg* v. *Gingles*, within the time constraints of article III, section 16(c). . . . Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation, as explained later in this opinion. [*In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 282 (Fla. 1992).]

The court's holding was specifically "without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act." *Id.* at 285-86. This "without prejudice" language means that there was no adjudication on the merits of the Voting Rights Act issues and thus no *res judicata* effect, as this Court has recognized. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990). The NAACP chose to litigate in federal court, which had concurrent jurisdiction. J.S. App. 16a.

Subsequently, when the United States Department of Justice did not preclear Florida's reapportionment under Section 5 of the Voting Rights Act and the Florida legislature reached impasse, the Florida Supreme Court, pursuant to the Florida Constitution, adopted a revised Florida reapportionment plan that resolved the Section 5 objections. The limited nature of the second Florida Supreme Court proceeding was emphasized by its Chief Justice, who stressed that "this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry. . . ." *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So. 2d 543, 548 (1992) (Shaw, C.J., specially concurring).

Neither *res judicata* nor collateral estoppel is therefore applicable here.

V. PROPORTIONAL REPRESENTATION IS NOT AN ABSOLUTE DEFENSE.

Proportional representation is neither an absolute floor nor an absolute ceiling under Section 2 of the Voting Rights Act. The Act itself expressly disclaims that proportional representation is any type of floor for equal political opportunity for minorities. 42 U.S.C. § 1973(b). Neither is proportional representation, without evidence of sustained electoral success, a ceiling on equal political opportunity. This Court so held in *Thornburg* v. *Gingles*, 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in judgment) ("I agree with Justice Brennan that *consistent and sustained success* by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation") (emphasis supplied).

The statutory test under Section 2(b) requires examination of the "totality of the circumstances." As this Court stated in *Gingles*:

> Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S. Rep. at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,'" noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.*, at 29, n. 115 [citations omitted]. The Senate Committee decided, instead, to "'require an independent consideration of the record.'" S.Rep. 29, n. 115. The Senate Report also

> emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.*, at 30 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. [478 U.S. at 75.]

Applying the "totality of circumstances" test, this Court in *Gingles* held that *sustained* electoral success in *the last six elections* that resulted in proportional representation of African-American residents in House District 23 was a successful defense negating any allegation of unequal opportunity to elect representatives of choice by African-Americans. *Id.* at 77. This Court rejected the contention of appellants "that if a racial minority gains proportional or nearly proportional representation *in a single election*, that fact alone precludes, as a matter of law, finding a § 2 violation." *Id.* at 75 (emphasis supplied).

Similarly here, in the absence of a showing of sustained electoral success, proportional representation is but one factor in the totality of circumstances to be taken into account. The court below considered the evidence, gave it proper weight and committed no error.[24]

Since proportional representation is not an absolute defense but only one of several factors in the "totality of circumstances", issues as to its measurement (*i.e.*, total population, VAP or CVAP) take on less importance in this case and may well vary from case to case depending on local circumstances. The measurement issue was left open by this Court in *Growe* v. *Emison*, 113 S.Ct. at 1083 n.4.

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[24] The court considered evidence both statewide and with respect to the Dade County area. Both are part of the "totality of circumstances"; House appellants unduly emphasize County statistics alone. With respect to African-Americans, the court below made extensive statewide findings about past discrimination in Florida against African-Americans. *See, e.g.*, J.S. App. 53a-54a.

In this case, the district court made detailed findings of fact about the use of VAP,[25] the need for a Hispanic supermajority VAP to take into account lower citizen and registration rates,[26] and the use of a lower majority VAP for African-Americans reflecting recent increases in African-American turnout and voter registration.[27] The court, noting the unavailability of CVAP data, heard testimony of estimates of noncitizenship among Hispanics, found certain estimates to be unreliable,[28] and relied instead on an analysis of past election results by Dr. Lichtman to estimate noncitizen rates.[29]

In short, the district court did precisely what this Court, in *Gingles*, indicated had to be done. It made careful factual findings about the impact of non-citizenship. There is no need for this Court to reach, much less reverse, those findings.

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[25] J.S. App. 31a *et seq.*

[26] J.S. App. 32a *et seq.*

[27] J.A. App. 39a-40a.

[28] J.S. App. 74a (Vinson, J., concurring).

[29] J.S. App. 75a (Vinson, J., concurring).

CONCLUSION

The NAACP respectfully submits, for the reasons set forth above, that the liability findings of the district court should be affirmed, the permanent remedial plan should be vacated and remanded for a full evidentiary hearing, and this Court should not reach or decide hypothetical issues about influence districts and CVAP.

Respectfully submitted,

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